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In Reply Refer to:

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In re: **FM Translator DW272AT, Columbus, Ohio**
Wilks License Company – Columbus LLC
File Nos. BPFT-20100318AAF, BLFT-
20111118CSA, BRFT-20120524AIB
Facility ID No. 72310

Petition for Reconsideration

Dear Counsel:

The Media Bureau (“Bureau”) has before it: 1) the Petition for Reconsideration (“Wilks Petition”) filed by Wilks License Company – Columbus LLC (“Wilks”)¹, the former licensee of FM translator station DW272AT, Columbus, Ohio (“Station”), seeking reconsideration of a Bureau decision² declaring the Station’s license expired as a matter of law, and dismissing Wilks’s applications for a license to cover the Station’s construction permit (“License Application”)³ and for renewal of the Station’s license (“Renewal Application”);⁴ and 2) a Motion for Stay (“Motion”) of the *Staff Decision*.⁵ For the reasons set forth below, we deny the Wilks Petition and dismiss the Motion as moot.

Background. The Station went silent on March 12, 2010, due to a complaint that it was causing interference to WWCD(FM), a first-adjacent channel full-service station in Baltimore, Ohio.⁶ Days after

¹ The Wilks Petition was filed on July 11, 2013. Franklin Communications, Inc. (“Franklin”) filed an Opposition to the Wilks Petition on July 24, 2013.

² Wilks License Company – Columbus LLC, Letter, 28 FCC Rcd 8924 (MB 2013) (“*Staff Decision*”).

³ File No. BLFT-20111118CSA.

⁴ File No. BRFT-20120524AIB.

⁵ Wilks filed its Motion on July 11, 2013. Franklin filed an Opposition to the Motion on July 22, 2013. On July 30, 2013, Wilks filed a Reply and a Motion for Leave to File. Franklin filed a Motion to Strike Wilks’s Reply on August 6, 2013. All the pleadings filed after the Opposition are unauthorized pleadings and will be dismissed. *See* 47 C.F.R. § 1.45. *See, e.g., Fourteen Hundred, Inc.*, Letter, 15 FCC Rcd 4486, 4488 (MB 2010) (declining to consider unauthorized pleadings).

⁶ An FM translator, as a secondary service, is required to suspend operations if it is causing interference to a full service FM station. 47 C.F.R. § 74.1203. Such interference resulted here because WHCD(FM) moved its transmitter site westward toward the Station in conjunction with a change in its community of license from

taking the Station off the air, Wilks filed an application (“Displacement Application”)⁷ on March 18, 2010, requesting a waiver of Section 74.1233(a)(2) of the Commission’s Rules (“Rules”) to specify non-adjacent Channel 231.⁸ On March 29, 2010, Franklin, licensee of WSNY(FM), Columbus, Ohio, filed an Informal Objection. On April 9, 2010, Wilks filed a request for Special Temporary Authority (“STA”) to remain silent.⁹

The Bureau granted Wilks’s STA request on June 3, 2010, with the *caveat* that if broadcast operations did not commence within twelve months from the date it went silent, *i.e.*, by 12:01 a.m. on March 13, 2011 (“312(g) Expiration Date”), the broadcast license for the Station would expire automatically as a matter of law pursuant to Section 312(g) of the Communications Act of 1934, as amended (“Act”).¹⁰ On October 27, 2010, the Media Bureau denied the Franklin Informal Objection, granted the Displacement Application and issued a construction permit (“Permit”).¹¹ The Permit bore an expiration date of October 27, 2013. Franklin then filed a Petition for Reconsideration of the Permit grant on November 22, 2010 (“Franklin Petition”), arguing that the Station should not be permitted to change its frequency due to potential interference issues with WSNY(FM). Wilks did not at that time request tolling of the Permit based on the Franklin Petition.

By the 312(g) Expiration Date, Wilks had neither completed construction authorized by the Permit nor resumed broadcasting. The Station’s license and all associated authorizations, including the Permit, thus expired as a matter of law. Nevertheless, Wilks implemented certain facility modifications and resumed Station operations on Channel 231 on November 10, 2011. It claimed that it was doing so pursuant to program test authority under the Permit.¹² On November 18, 2011, Wilks filed the License Application.¹³ On November 16, 2011, Franklin filed a “Suggestion of Expiration of W272AT License” contending that the Station’s license had expired pursuant to Section 312(g).¹⁴

While those matters were pending, the June 1, 2012 license renewal filing deadline for Ohio radio stations approached. Wilks filed a license renewal application on May 24, 2012,¹⁵ although at this time there was no valid Station license to renew.

Zanesville, Ohio to Baltimore, Ohio. The Station’s transmitter site is encompassed by the modified WHCD(FM) service contour.

⁷ See File No. BPFT-20100318AAF.

⁸ Displacement Application at Exhibit 1.

⁹ See File No. BLSTA-20100409AAV.

¹⁰ See 47 U.S.C. § 312(g).

¹¹ *Letter to Wilks License Company-Columbus LLC*, Ref. 1800B3 (MB Oct. 27, 2010). See *Broadcast Actions*, Public Notice, Report No. 47353 (MB Nov. 1, 2010).

¹² See Resumption of Operations filed on November 14, 2011.

¹³ See File No. BLFT-20111118CSA. Franklin filed an Informal Objection (“License Objection”) on November 23, 2011 and Wilks filed a Response on December 7, 2011. Franklin filed a “Supplement to Informal Objection and Comments on Response” on December 14, 2011 to which Wilks filed a Reply on December 30, 2011.

¹⁴ Wilks filed a “Response in Opposition to ‘Suggestion of Expiration of W272AT License’” on November 21, 2011.

¹⁵ See File No. BRFT-20120524AIB. Franklin filed a Petition to Deny on September 4, 2012. Wilks filed an Opposition on September 28, 2012. Franklin filed a Reply on October 18, 2012. Wilks then filed a “Petition for Leave to Respond to Franklin’s Reply” and a “Response to ‘Reply to Opposition to Petition to Deny’” on October 26, 2012. Franklin filed an “Opposition to Petition for Leave to Respond to Franklin’s Reply” and a “Precautionary

In the June 20, 2013, *Staff Decision*, the Bureau confirmed that the Station's license had expired as a matter of law pursuant to Section 312(g), rendering the Permit a nullity.¹⁶ The Bureau rejected Wilks's argument that its extended silence "was through no fault of its own" and stated that it would delete the Station's call sign.¹⁷ While acknowledging that the Commission has limited discretion under Section 312(g) to reinstate or extend a license term "to promote equity and fairness," the Bureau found insufficient reason to exercise that discretion based on its careful review of the facts of this case.¹⁸ In particular, it found that Wilks did not allege any circumstance that "prevented" it from resuming operations.¹⁹ The Bureau also dismissed as moot the Franklin Petition, the License Objection, and Petition to Deny the Renewal Application. Wilks sought reconsideration on July 11, 2013. On August 5, 2013, Wilks requested tolling of the Permit's three-year construction period based upon the filing of the Franklin Petition nearly three years earlier.

On reconsideration, Wilks argues that the Bureau's refusal to exercise discretion to reinstate or extend the Station's license was arbitrary and capricious.²⁰ Wilks argues that it could not timely resume operations because it would have "risked the possibility that [the Franklin Petition] might be successful."²¹ Additionally, Wilks argues that the precedent upon which the Bureau relied does not support or justify the Bureau's decision. Wilks argues that the Bureau *must* treat potential forfeiture of a silent station's license the same way that it treats the potential forfeiture of an unbuilt construction permit by allowing a licensee, which cannot lawfully return to the air except through building under a construction permit subject to appeal, more time to return to the air by reinstating or extending the license pursuant to Section 312(g). To that end, Wilks argues that its construction period was "encumbered" due to the Franklin Petition.

In its Opposition, Franklin argues that every point raised in the Wilks Petition was considered and rejected by the Bureau in the *Staff Decision* and that nothing stopped Wilks from resuming operations by the license's expiration date. Rather, it claims that Wilks made a business decision not to resume operations "when it could easily have done so."²² Franklin further argues that Wilks was not justified in assuming it could defer construction during the pendency of the Franklin Petition without risking the Station's license.²³ Lastly, Franklin argues that Wilks violated Section 74.1251 of the Rules²⁴ by using a different antenna than authorized in the Permit and therefore cannot fairly be said to be an "innocent victim."²⁵

Comments on Response to Reply to Opposition to Petition to Deny" on November 8, 2012. All the pleadings filed after the Reply were dismissed as unauthorized pleadings pursuant to 47 C.F.R. § 1.45. *Staff Decision* at n.5.

¹⁶ *Staff Decision*, 28 FCC Rcd at 8927.

¹⁷ *Id.* at 8925.

¹⁸ 47 U.S.C. § 312(g).

¹⁹ *Staff Decision* at 8927.

²⁰ Wilks Petition at 2.

²¹ *Id.* at 4.

²² Opposition at 3-6; *see also* Declaration, Attachment 2.

²³ Opposition at 6.

²⁴ 47 C.F.R. § 74.1251.

²⁵ Opposition at 8. More specifically, the Permit authorized use of a Shively 6813-1R antenna. Wilks returned the Station to operation using an ERI CP-22. *Id.*

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original order or raises additional facts not known or existing at the time of the petitioner’s last opportunity to present such matters.²⁶ Wilks has shown neither error nor new facts.

Wilks’s appears to conflate two separate provisions that have different standards for grant: (1) tolling of a three-year deadline to construct facilities pursuant to Section 73.3598(b) of the Rules; and (2) reinstatement of licenses that expired pursuant to Section 312(g) upon failure to operate for a period of one year. Wilks seems to believe that an applicant that qualifies for relief under our tolling policies is eligible for equitable relief under Section 312(g). We disagree.

Under Section 73.3598(b), a permit’s construction deadline tolls upon timely notification that the permit is subject to certain circumstances beyond the permittee’s control, e.g., a pending petition for reconsideration of the permit grant. This appears to be the standard upon which Wilks now relies. Wilks did not submit a timely request to toll the Permit’s construction deadline pending a final decision on the Franklin Petition.²⁷ However, such a request would only stop the construction “clock” tied to its Permit; tolling could not have stopped the separate Section 312(g) “clock.” By the time Wilks requested tolling on August 5, 2013, the Station’s underlying license had already expired as a matter of law and no valid permit remained to be tolled.

The primary provision governing the instant case is Section 312(g) of the Act.²⁸ Under Section 312(g), we consider whether reinstatement of an expired license is warranted to “promote equity and fairness.” In *Silver Fish*, we rejected an argument similar to Wilks’s as an “overly broad reading of Section 312(g),” noting that such an interpretation “would permit extended periods of silence whenever any petition or objection is filed against any application.”²⁹ We further explained that language in Section 312(g) about “prevail[ing] in an administrative or judicial appeal” is listed as an illustrative example of a “reason to promote equity and fairness.”³⁰

Questions of equity and fairness under Section 312(g) are resolved by conducting a case-by-case analysis of the relevant facts.³¹ The Commission has exercised its authority to reinstate an expired license in only rare circumstances, each of which involved silence for compelling reasons beyond the licensee’s control.³² On the other hand, the Commission has refused to exercise discretion under Section 312(g)

²⁶ 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

²⁷ See 47 C.F.R. § 73.3598(b) (construction period tolled upon request under Section 73.3598(c) when the grant of a permit is the subject of administrative review). See also 47 C.F.R. § 73.3598(c) (“A permittee must notify the Commission as promptly as possible and, in any event, within 30 days, of any pertinent event covered by paragraph (b) of this section, and provide supporting documentation.”)

²⁸ 47 U.S.C. 312(g).

²⁹ *Silver Fish Broadcasting, Inc.*, Letter, 28 FCC Rcd 15816 (MB 2013) (“*Silver Fish*”).

³⁰ *Id.*

³¹ See *Eagle Broadcasting Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 600-01 (2008), *aff’d sub nom. Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543 (D.C. Cir. 2009) (“*Eagle Broadcasting*”) (stating that “[t]he Commission and its staff will determine on a case-by-case basis whether any purported equities associated with individual circumstances warrant reinstatement of a license forfeited pursuant to Section 312(g)”).

³² See, e.g., *V.I. Stereo Communications Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstatement warranted where station’s silence attributable to destruction of towers in hurricane and substantial damage to subsequently rebuilt towers in additional hurricanes); *Community Bible Church*, Letter, 23 FCC Rcd 15012, 15014 (MB 2008) (reinstatement warranted where licensee took all steps needed to return to air from

where the failure to resume station operations was due to the licensee's own actions, finances, and/or business judgments.³³ In this case, we find no error in the Bureau's finding that the facts do not support an exercise of discretion under Section 312(g) and we affirm the conclusion in the *Staff Decision*.

Wilks took the Station off the air on March 12, 2010, to comply with our requirement that translators, as secondary stations, not cause harmful interference to full-service stations.³⁴ The Bureau specifically warned Wilks at that time that the Station license would expire as a matter of law if the Station did not resume operation by the 312(g) Expiration Date. Accordingly, Wilks knew that it would forfeit the license if it did not timely implement the necessary Station modifications. The Commission has repeatedly warned parties in Wilks's situation that the failure to resume operations within one year would result in all associated authorizations, including construction permits bearing later expiration dates, automatically becoming null and void.³⁵

The Bureau recognized that although Wilks was authorized to construct and commence operation with the modified facilities at any time after its Displacement Application was granted on October 27, 2010, the Permit was subject to administrative review due to the Franklin Petition. At that point, Wilks could have: (a) carried out the modification pursuant to the Permit and assume the risk that the Permit grant would be rescinded;³⁶ or (b) requested an STA to return to the Station to the air with

replacement site prior to 12 months of silence but nevertheless remained off air to promote air safety after discovering and diligently reporting that FCC and FAA records contained incorrect tower information for which it was not responsible); *Mark Chapman, Court-Appointed Agent*, Letter, 22 FCC Rcd 6578 (MB 2007) (reinstatement warranted where extended silence resulted from licensee's compliance with a court order).

³³ See *Creative Media*, Letter, 21 FCC Rcd. 689 (MB 2006) (reinstatement unwarranted where station was silent for more than 18 months for relocation of transmitter due to loss of its licensed transmitter site without any proffered justification for the delay); *Kanza Society*, Letter, 25 FCC Rcd 12812 (MB 2010) (reinstatement unwarranted where station voluntarily went silent to prevent potential interference to unbuilt, new station, although the Rules do not require cessation of operations absent actual interference, and licensee did not seek permission to change to non-adjacent channel because it was not aware of Commission's waiver policy); *A-O Broadcasting Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 617 (2008) (reinstatement unwarranted where licensee had discontinued operations, was ordered by the Commission to remain silent until public safety rule violations at transmitter site were addressed, lost permission to use transmitter site as a result of potentially hazardous operations, and subsequently failed to timely complete construction at alternate site); *ETC Communications, Inc.*, Letter, 25 FCC Rcd 10686, 10689 (MB 2010) (reinstatement unwarranted where licensee chose not to operate financially struggling station while offering it for sale); *Family Life Ministries, Inc.*, Letter, 23 FCC Rcd 15395 (MB 2008) (reinstatement unwarranted where station deactivated for economic reasons within licensee's control); *Kirby Young*, Letter, 23 FCC Rcd 35 (MB 2008) (reinstatement unwarranted where licensee not financially able to restore operations after transmitter failed); *Zacarias Serrato*, Letter, 20 FCC Rcd 17232 (2005) (reinstatement unwarranted where licensee made business decision not to obtain an alternate site promptly).

³⁴ See 47 C.F.R. § 74.1203(b).

³⁵ See *Implementation of Section 403(l) of the Telecommunications Act of 1996 (Silent Station Authorizations)*, 11 FCC Rcd 16599, 16601 (1996) ("The 1996 Act is clear that the relevant period of the silence is that of the station. The period is not based on any particular licensee or facility. Accordingly . . . the modification of the licensed facilities . . . will not toll or extend the 12-month period, notwithstanding any provision in any authorization to the contrary. . . . Therefore, parties seeking . . . to modify the facilities of a silent station should make sure that sufficient time exists, before the automatic expiration of the license, to return the station to the air. With the expiration of a station's license, all associated authorizations related to that station necessarily would become null and void because there can be no continued authority absent a valid station license.") (emphasis in original).

³⁶ See, e.g., *KPBZ(FM), Spokane, WA*, Letter, 28 FCC Rcd 10115, 10116 n.4 (MB 2013) (stating that permittees elect to construct at their own risk while construction permits were subject to administrative review). See also *WKVE*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 23411, 23415 (2003)

temporary, lesser facilities that would not present an interference problem. However, Wilks neither constructed nor requested an STA to resume operations before the 312(g) Expiration Date.

The Bureau properly did not view Wilks's belated construction as a mitigating factor. Wilks, without authority, undertook construction pursuant to a nullified construction permit and returned the Station to operation on November 10, 2011, approximately eight months after it had expired as a matter of law. Moreover, Wilks's unauthorized construction and operation violated our Rules by using facilities different from those authorized in the nullified construction permit.³⁷ Wilks acknowledged in the License Application that the modified facilities it actually constructed use an ERI CP-22 half-wave spaced antenna in place of the Shively 6813-1R antenna authorized in the Permit.³⁸

Accordingly, the Bureau properly determined that exercise of discretion under Section 312(g) to promote "equity and fairness" is not warranted due to Wilks's unauthorized construction and operation in violation of the Act and our Rules, as well as Wilks's inaction between the filing of the Franklin Petition on November 22, 2010, and the 312(g) Expiration Date on March 13, 2011.³⁹

Furthermore, because we have determined that an exercise of discretion pursuant to Section 312(g) is not warranted, Wilks's Motion is moot.

Conclusions/Actions. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Wilks on July 11, 2013, IS DENIED. IT IS FURTHER ORDERED that the Motion for Stay filed by Wilks on July 11, 2013 IS DISMISSED AS MOOT.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

(acknowledging that a permittee proceeded at its own risk when it built a station while reconsideration of the grant was pending before the Commission).

³⁷ The Rules prohibit mechanical or electrical modifications in an authorized FM translator station without prior authority of the Commission. 47 C.F.R. § 74.1251. An application on FCC Form 349 is required when a permittee or licensee seeks a change in an FM translator station's transmitting antenna system. 47 C.F.R. § 74.1251(b)(2).

³⁸ Wilks states that, notwithstanding the different antenna, "[t]he change in antenna in no way impacts the coverage or inference studies detailed in the application for CP." See File No. BLFT-20111118CSA at Exhibit 9.

³⁹ See *Eagle Broadcasting*, 23 FCC Rcd at 593 (permitting unauthorized operations to avoid automatic license expiration under Section 312(g) would encourage violations of Section 301 prohibiting the transmission of radio signals except in accordance with authority granted by the Commission).